Supreme Court, U.S.
Supreme Court, U.S.
FILED
95-184 FEB 13 1995
OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1995

TOM SHAW, INC.,

Petitioner,

v.

TOGO WEST,
SECRETARY OF THE ARMY,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

THOMAS R. HUNGERFORD (P40000)
Attorney for Petitioner
3857 S. Straits Hwy.
P.O. Box 849
Indian River, MI 49749
(616)238-4333

QUESTIONS FOR REVIEW

I. A TERMINATION FOR THE GOVERNMENT'S CONVENIENCE CONVERTS A FIXED PRICE CONTRACT TO A COST REIMBURSABLE CONTRACT.

II. CONTRACT CLAUSE SP.33 IS APPLICABLE TO A TERMINATION FOR CONVENIENCE PRICING ACTION.

SIGNIFICANCE OF CASE

Tom Shaw, Inc. is a small business that had a bonding capacity of $9,000,000 at the time of its contract with the U.S. Corps of Engineers. Presently, Tom Shaw, Inc. is in chapter 7, has no bonding capacity, its credit rating is non-existent and in the process of being forced to liquidate. Tom Shaw, Inc. has not been fully reimbursed for the work performed in this contract, due to misinterpretation of the contract and termination for convenience clause.

This case has great significance since the Engineering Board of Contract Appeals and the U.S. Court of Appeal for the Federal Circuit has misinterpretated and committed a major error of law in their interpretation and appreciation of a termination of convenience by a Governmental Unit. It is the petitioner's

position that the interpretation issued on this contract by Engineering Board of Appeals and the U.S. Court of Appeals for the Federal Circuit is a bizarre twist of the existing case law and is conflict with other decisions of the court and federal regulations including both Federal Acquisition Regulations, ("FAR"), and Defense Acquisitions Regulations, ("DAR").

Additionally, the court is being asked to review a section of the specification contract , SP-33, that relates to completion of equipment rates for the purpose calculating

equipment costs in termination settlement proposal. This issue has never been addressed by this court and if heard will give the lower court's guidance in termination for convenience clauses in most governed Government contracts. A n d finally, this petition, if left in its

present states, not only affects Tom Shaw, Inc. but all other small businesses, who have entered into work for the Government. Termination for convenience is not an open season for the Government to dishonor its contractual obligations.

As part of termination for convenience clause, the Government has the right to stop any contract in progress for whatever reason. But as a result of this right, the Government must make the aggrieved contractor financially whole again in a timely manner. Case law has tested this legal proposition and until this case has always supported the aggrieved partly due to the Government's unfettered power and ability to terminate contracts.

TABLE OF CONTENTS

	Page
Questions for Review	ii
Significance of Case	iii
Table of contents	v
Table of Authorities	vi
Statement of Jurisdiction	vii
Statement of Case	1
Legal Arguments	13
I. A termination for the Government's convenience converts a fixed price contract to a cost reimbursable contract.	13
II. Contract Clause SP.33 is applicable to a termination for convenience pricing action.	19
Conclusion	26

Appendix

Red Appendix:
Assignment by Chapter 7 trustee termination contract claim to Tom Shaw.

Orange Appendix:
Judge Charles Sheridan's Opinion and Termination for Convenience Clause on page 80.

Yellow Appendix:
Judgement of U.S. Court of Appeals for Federal Circuit.

Green Appendix:
Tom Shaw, Inc. 90-1 BCA 22,580.

Blue Appendix:
Construction contract and SP.33.

TABLE OF CASES AND AUTHORITIES

Blount Bro's Corp. v. U.S., 872 F2d 1003 (Fed. Cir. 1989)

Caskel Forge, Inc., 1962 BCA ¯3318

Codex Corp. v. U.S., 226 Ct. Cl. 693 (1981)

Corliss Steam Engine Co. v. U.S., 916 S. Ct. 321 (1871)

Kalvar Corp. v. U.S., 543 F.2d 1298 (Ct. Cl. 1976)

Lisbon Contractors, Inc., v. U.S., 543 F.2d 1298 (ct. Cl. 1976)

M.E. Brown, 91-1 BCA ¯23,293

Maxima Corp. v. U.S., 847 F.2d 1549 (Fed. Cir. 1988)

Melvin Wilner v. U.S., Slip Opinion No. 92-5161

(Fed. Cir. 5/24/93)

New York Shipbuilding Co., 73-1 BCA ¯9852

Paul E. McCallum, Sr., 81-2 BCA ¯15,311

R.G. Robbins & Co., Inc., 83-1 BCA ¯16,420

R.H.J. Corp., 69-1 BCA ¯7587

Scope Electronics, Inc., 77-1 BCA ¯12,404; recon denied 77-2 BCA ¯12,586

Tom Shaw, Inc., 90-1 BCA ¯22,580

Torncello v. U.S., 681 F.2d 756 (Fed. Cir. 1982)

Wolfe Constr. Co., 88-3 BCA ¯22,122

STATEMENT OF JURISDICTION

Tom Shaw, Inc. appealed the January 26, 1993 Engineering Board of Contract Appeals ("Eng BCA" or "Board") decision by Administrative Law Judge Charles J. Sheridan which denied in part Tom Shaw's $10.3 million appeal from the final decision of the contracting officer that denied Tom Shaw additional termination for convenience costs. The United States Court of Appeals for the Federal Circuit in a judgment dated November 14, 1994, affirmed the opinion of the Eng BCA. Tom Shaw, Inc. is requesting that this court grant a petition for a writ of certiorari to review the judgment entered by U.S. Court of Appeals for the Federal Circuit. 28 *U.S.C.* 2101

STATEMENT OF THE CASE

Tom Shaw, Inc., ("Shaw" or "Petitioner"), is a small business located in northern Michigan, which employed approximatly 100 people. Currently, Shaw has filed for bankruptcy. See Red Appendix for statement from the trustee. On August 31, 1983, Shaw was awarded a contract for $2,306,24.90 by the U.S. Corps of Engineers, ("Government" or "Respondent"), to quarry and barge 60,000 tons of rip-rap for the main breakwater at Pt. Judith, R.I. See Blue Appendix for a copy of the contract. The contract was later modified to $2,274,749.40. Shaw has been paid $2,742,763.07 for direct costs and $282,550.00 as settlement expenses under termination settlement proposal. Prior to the contract being awarded a pre-award

hearing was held and the Government informed Shaw that about 90% of the work was on the harbor side and only 10% was seaside. Shaw relied upon the Government's representations. Shaw visited the Pt. Judith site prior to its submitting a bid for the contract.

As part of the contract, the Government was to engineer/survey or lay-out the job; however, the centerline had to be reset, which resulted in a major change in the project. Shaw bid the job and anticipated working the project at Point Judith from the calm waters of the harbor side, not the stormy seas of the Atlantic Ocean. The plan and specifications indicated the major work was the repair of the change to the harborside slope of the breakwater. It became apparent after the contract was signed that the harborside was largely intact. This further complicated

Shaw's job. The centerline on the project had to be moved 2 1/2"-10' towards the harborside. (A baseline or centerline may be congruent. The first is simply a line from which measurements are taken and the other is the center of the breakwater). The major part of the work was to the seawardside. This is directly contrary to a reasonable interpretation of the plan and specifications submitted by the Government to be bid. The additional cost of daily work on the seawardside came from having to deal with the oceanic water and wave action, not the peace and tranquility of the ocean water in the harbor. The work shifted from 10% seaside/90% harborside,; as shown on the contract drawings, to 90% seaside/10% harborside. The cost effect of this change was to increase the contract from $2.3 million to $7.6 million. Job change #2 was finally issued in September

of 1984 to cover the necessary changes. No plans or specifications were attached to the job change order. Based upon the production rates, Shaw estimated that the project would require several million more dollars to complete. The original drawings and specifications of the Government detailed approximately 30 pieces of displaced stone that had to be removed so that the Shaw's barges could enter the breakwater. But the real conditions revealed thousand of tons of additional stone. After several meetings with the Government, job order #1 was issued so that the stone could be reused and Shaw could have access to the breakwall.

In addition to the above, the specifications and drawings submitted by the Government were not detailed with regards to the placement of the stone. The original drawings and specifications were

defective and/or ambiguous. Shaw continued work on the project until forced to close the project down due to the weather on Christmas Eve, December 24, 1984.

After several meetings with the Government in late 1984 and early 1985, the Government advised Shaw that the contract was to be terminated for convenience. Work was stopped. However, the Government asked Shaw, as part of the termination for convenience, to load, clean-up and set off the remaining 30,000 tons of stone at the dock on the breakwater.

Shortly thereafter, the termination for convenience directions, mentioned above, were again amended, directing Shaw to remove approximately 10,000 tons of stone. Clean-up work at the quarry was to be stopped. As directed by the Government, Shaw was forced to remobilize during the winter months. During this period, car

float #12, while transporting large boulders between Davisville and Point Judith, RI, capsized. Shortly thereupon, the Government proceeded to issue a termination for default.

Shortly after the termination for default, the Government began an exhausting and expensive investigation of Shaw. After several months of investigation, the Government turned the termination for default into another termination for convenience. This is unprecendented unusual to have two terminations for convenience on the same contract. This decision was made only after Shaw was exonerated of any wrongdoing in two investigations by the Criminal Investigation Division (CID) and by the U.S. Department of Labor (DOL).

As before mentioned, this Petition presents an extraordinary circumstance of

two convenience terminations on the same contract. Two Final Decisions by the Respondent's Contracting Officer, ("CO"), resulted in payment of a sum in excess of the adjusted Contract value. Respondent's position - that payment of actual costs reflected in Petitioner's cost records provides sufficient compensation - has been adopted by the Eng BCA without due regard for DAR S8-301, i.e., strict accounting principles shall not apply; rather, the CO should exercise sound business judgment in deciding what is fair compensation because **fairness** is the controlling principle to be applied. Shaw's economic circumstances at the time of the contract award and the effect of two terminations determination based on the principle of fairness as the primary criterion required by DAR 8-301. The Eng BCA's validation of the Respondent's cost award to Petitioner

provides exclusive endorsement to the strict accounting principles contained in DAR 215 without so much as even a summary discussion of the fairness guidelines given in DAR 8-301.

The Board has made the following findings inconsistent with its position:

(1) The Contract Specifications were exacting yet not precise.

(2) The intended scope of Job Change #2 was vague.

(3) The Government did not disavow its Determination and

Finding ("D & F") issued incident to the initial convenience

termination which stated in part:

(a) A case for termination for default could be made but would be contested by Shaw or Shaw's Surety "on the basis of ambiguous specifications and changes being the cause of the problem."

(b) "Although not in agreement that the low production is due solely to changes or ambiguities, the Government's position is prejudiced by the fact that they do exist."

(4) The same D&F also stated that the Government's position rejecting Petitioner's work for improper placement of stone, was doubtful.

(5) The perpendicularity requirements of the specifications do not use the clearest imaginable language.

The events surrounding the Government's 2/6/85 decision to terminate for convenience, and not default, represent the most compelling evidence bearing on the Board's finding that Petitioner performed little satisfactory work. Those events consist of a 1/9/85 meeting between the parties' representatives who discussed the intent of the specifications. At this

BEST AVAILABLE COPY

meeting, Shaw's bonding company, Maryland Casualty, had retained Louis Caccese, retired Chief Construction Division, Corps Philadelphia District, and Frank Vinci, retired Chief Technical Engineering Branch, Corps Philadelphia District. The same Mr. Caccese testified at the trial before the Board as well. Mr. Caccese confirmed his opinions expressed on 1/9/85, to the effect that a changed condition had occurred "based on the fact that 90% of the repair work would have to be performed on the seawardside of the breakwater and 10% of the harborside, compared to 90% on the harborside and 10% on the seawardside as indicated on the Contract drawings." Mr. Caccese estimated this change plus the placement of armor stone would turn a $2,300,000.00 project into a $7,600,000.00 project. Mr. Caccese testified that he would regard this change as having

dramatically different effect on the cost of having to perform work on the seaward side as opposed to the harborside of the breakwater. He also testified that if he were administering the Contract, he would consider that a cardinal change had occurred. The Government's Minutes of this Meeting reveal that the CO directed his staff to prepare pricing under three modes: (1) termination for default; (2) termination for convenience; (3) negotiated agreement for termination.

Subsequent to the 1/9/85 meeting, in a Determination and Finding recommending a termination for convenience, the Government recognized that the Petitioner's interpretation of the phrase "perpendicular to the length" as allowing stone to be placed with their long axis horizontal would probably stand up as being reasonable. The Government concluded that:

(1) Its interests would be served by a termination rather than "to be exposed to the risk of paying an excessive amount to complete the work."

(2) The Government's plans and specifications should be revised to reflect job changes, eliminate ambiguities, and be reissued under a future contract.

It is undisputed that the Government recognized its position regarding rejection of Petitioner's work for improper placement of stone was **doubtful.**

The Board elected to disregard the Government's own admissions and substitute its judgment that Shaw's work, except for 160 feet, was not in conformance with the specifications, admittedly ambiguous, from the Government's perspective, and were admittedly "very exacting yet not precise" from the Board's perspective. The existence of a change was supported by Col.

Sciple's admissions in a letter dated 6/20/85 (1) that Petitioner's claim for additional payment of $1,191,190.90 for moving of the center line, had merit and requested a formal cost proposal; (2) that Petitioner was performing work beyond the scope of the contract under a second claim filed in 11/84 involving requirements governing the method of placing and inter locking stones on the breakwater.

These admissions were glossed over by the Board's findings that he would change in the centerline "reduced" the amount of work Petitioner would perform. Such findings are contrary to the contemporaneous documentation issued not by Shaw, but by the Respondent itself. Such findings ignore the countervailing facts that it was Respondent which erred in performing the survey indicating the centerline. Respondent's responsibility to

reflect the work to be performed has been overlooked, even though the Board does seem to acknowledge some semblance of imperfection in the specifications as being "very exacting, yet not precise" and the "perpendicularity requirements as not using the clearest imaginable language". The Board stops short of taking the next step and discounts Respondent's imperfections by finding Petitioner's work improper. Such findings are not supported by the record made primarily by Repsondent's own contemporaneous sources wherein Petitioner's interpretation of the specifications was found reasonable and its failure to make production was, at least in part, attributable to the difference of interpretation between Petitioner and Respondent as to specification requirements.

Some background regarding the period of performance may be helpful to the Court. The contract called for a performance period of 365 days. Notice to Proceed was issued 9/21/83 - thus establishing the required completion date on 9/23/84. It is undisputed that Petitioner did not complete by the required completion date; however, Respondent permitted Shaw to continue work beyond the stated date. No doubt Respondent was mindful that its failure to obtain the necessary Dredging Permit, required by the contract in Paragraph 2A-6, precluded Petitioner from commencing its work prior to the Permit's availability, which was obtained 2/84. Petitioner's equipment began work on 6/26/84, although the preparatory work at the site occurred much earlier, and preparatory work at the stone quarry had also occurred earlier as well.

In 6/84, discussions began between Shaw and Respondent regarding the conditions at the breakwater and the effect upon the work to be performed. These discussions focused upon three major conditions: (1) existence of displaced stone which blocked access to the breakwater (resolved by a VECP under Modification P00001 and the contract price was reduced by $31,500.00); (2) a conflict existed between what he drawings indicated as a centerline and the survey baseline, which resulted in more work on the seaward side than on the harborside (this was to have been resolved by Job Change #2, but the Government terminated before this Job Change #2 was resolved); (3) a conflict developed over the parties' interpretation of the specifications requiring placement of the armor stone to be perpendicular to the slope.

Discussions continued throughout the summer, fall and winter of 1984, as Shaw continued its work in an attempt to satisfy the Government Inspector. Finally, in early 1/85, the meeting of representatives from both parties and Petitioner's bonding company consultants occurred.

On 4/25/86, Petitioner presented its Termination for Convenience Cost Proposal. In that proposal, Petitioner detailed its time and materials proposal for removal of the stone and demobilization. A letter dated 2/19/85, describes a meeting which had occurred on 2/13/85. That letter recites Shaw's understanding that the post-termination work would be done on a time and materials basis.

Petitioner's equipment pricing rationale is also contained in the April Convenience Termination Proposal. Petitioner explained in detail why standby

time should be calculated as it was, why severity factors should be applied, and why the Region I Manual prescribed in Contract Clause SP-33 should be utilized for arriving at equipment rates for ownership and operating expenses. Briefly put, Shaw pointed out that actual costs for each piece of equipment for ownership and operating costs were not ascertainable from its cost records kept as a small business which was not required to comply with Cost Accounting Standards.

The Region I Manual provides that its purpose was for use as guidance in those situations where a contractor's actual ownership and operating costs could not be ascertained for each piece of equipment. In the Preface to the Region I Manual, its use is prescribed for forward pricing and for negotiated procurements. The Board found that it was unclear whether SP-33

should be applied to convenience termination pricing actions. Yet, the Preface itself speaks to its application in "all construction contracts except dredging and all negotiated procurements" which Respondent's CO Rhen considered to be "termination for convenience".

The two-part issue before this Court is whether contract clause SP-33 should be disregarded and whether actual costs represent fair compensation to Petitioner for tying up its equipment from 2/6/85, the date of the first termination through 3/88, the date Respondent's CO made a final decision. Awarding actual ownership and operator costs for non-operating equipment begs the question of fairness by failing to consider Petitioner's inability to put its equipment to work was impeded both by the Petitioner's non-existent bonding capacity and the deteriorated condition of the

equipment resulting from its use in severe terrain. The Board's findings ignore that the idleness of Petitioner's equipment was caused by the suspended state of events originated by Respondent's failure to adequately draft its specifications and to properly describe the location and nature of the work and continued by Respondent's failure to promptly and reasonably compensate Petitioner by payment of such costs necessary to make the contractor whole under the principle of fairness. The protracted process to which Petitioner was subjected, of charging wrong-doing, which charges were dismissed; conducting four time-consuming and expensive audits, whose recommendations were not followed according to the Board; and last, engaging in 20 negotiation sessions, is itself inconsistent with fair treatment under convenience termination guidelines.

The Board was critical of Petitioner's performance of acceptable work effort on ten constructive changes for which Petitioner submitted cost proposals. The Board's examination of these changes served as the basis for its finding that there is no basis to justify an increase to the contract price. The Board heard no testimony from Respondent's CO addressing the issue of why an amount in excess of the adjusted contract price was paid to Petitioner. The Board heard limited testimony from one of the staff for the CO who indicated that the Respondent did so because there was at least on undefinitized change and Respondent was trying to be fair to Petitioner. The Board heard no testimony from Respondent's CO that he considered the Contract to be a loss contract or that he considered application of a loss factor. Finally, the Board heard

no testimony from Respondent's CO that he considered denying profit. Rather the final decision itself and G-70, a cost memorandum prepared to summarize the costs paid to Petitioner, contain a reference to a profit factor of 10%. The Board's de novo power of review must have some reasonable basis in the record before it. The Board professed that it did not intend to second-guess the CO's cost allowances. Yet, its findings do exactly that. The Board's de novo decision appears to be saying three inconsistent things: (1) The Board finds no justification to raise the contract price; (2) Yet, the CO's action of payment in excess of the contract price is acceptable to the Board; and (3) The fact that the CO so acted does not convince the Board that the CO intended to increase the contract price. Such a conclusion defies logic and existing case law as will

be more thoroughly discussed in the Legal Arguments Section.

The instant Petition involves a complex set of circumstances beyond the usual complexity of addressing a termination for the Government's convenience which concedes liability but seeks examination of costs. The Board below overlooked its task of examining the business judgment of the CO to ascertain whether Petitioner had been fairly made whole by the cost adjustments paid and made. The Board found that the CO had been generous or overly generous. The 17-month time lag between 2/6/85, the date of the first termination, and 9/22/86, the date of the first payment made pursuant to partial agreements per negotiation, was not examined. Nor was the Petitioner's financial condition at time of Award evaluated. Petitioner's bonding capacity

and it's business have been destroyed by circumstances surrounding the two convenience terminations. Yet, because such bonding costs were not an actual cost reflected on Petitioner's books, so goes the argument, no compensation could and should have been paid.

Having outlined the relevant facts for the Court's consideration, Petitioner now turns to its Legal Arguments.

LEGAL ARGUMENTS

ARGUMENT 1;

A termination for the Government's convenience converts a fixed price contract to a cost reimbursable contract.

It is axiomatic that, upon termination of a contract for convenience, the terminated portion of a fixed price contract is converted to a cost reimbursable contract. (*R.G. Robbins & Co.*,

Inc., 83-1 BCA ¯16,420 and *Paul E. McCallum, Sr.*, 81-2 BCA ¯15,311).

The Board below concedes as much at page 59 of its Opinion. However, the Board finds that such a statement of cost principle is an oversimplification because of three countervailing cost principles which the Board finds to be inconsistent with treating the fixed price contract as unqualifiably being converted to a cost reimbursable contract.

Since the Board's Opinion attempts to qualify the existing body of case law regarding the conversionary effect of a termination upon a fixed price contract, some background of this previously unchallenged cost principle is in order. As this Court is well aware from opinions in *Maxima Corp. v. U.S.*, 847 F.2d 1549 (Fed. Cir. 1988) and *Torncello v. U.S.*, 681 F.2d 756

(Fed. Circ. 1982) the Government may not use the Termination for Convenience Clause to dishonor, with impunity, its contractual obligations. The Government's power to terminate a contract when its completion is no longer in the Government's best interest developed after the Civil War. In *Corliss Steam Engine Co. v. U.S.*, 916 S. 321, 322, (1871) the U.S. Supreme Court established the legal theory supporting the modern termination clause included in both civilian and military contracts. The progeny of cases following after the *Corliss* decision has established that a termination for convenience, actual or constructive, is not an "open license to dishonor contractual obligations", *Torncello*, 681 F2d at 770, 772. The only real limitation upon the Government's power to terminate for its convenience, places an almost impossible

burden upon the contesting contractor to prove bad faith or clear abuse of discretion. *Kalvar Corp. v. U.S.*, 543 F.2d 1298, 1304-1305 (Ct. Cl. 1976) cert denied 434 U.S. 830 (1977). Thus, care must be taken to reconcile the Government's power with the benefits conferred upon both parties, lest the Government be permitted to avoid the cost effects of a bad bargain while the contractor is permitted to recoup only his actual costs plus a reasonable profit.

The Board maintains at p. 58 of its Opinion, that the overall theory of the termination for convenience clause is "relatively straight forward." The Board speaks in glowing terms of the benefits to the contractor of a termination for convenience, i.e., the contractor is "relieved of some of the work and its cost" and the contractor may have been "rescued from potential loss". The Board never

addresses the parallel benefits conferred on the Government, i.e., the Government has avoided liability for payment on a contract intended to be binding. In order to equalize the position of the parties in the somewhat awkward situation generated by a termination for convenience, DAR S8-301 was passed to enable the CO to recognize the unique circumstances created by such a termination by awarding the contractor costs under the controlling principle of fairness. Besides application of DAR S8-301, the courts have fashioned theories which ameliorate the harsh effects of a termination and increase the contractor's ability to recover costs for attempts to perform under defective or impossible specifications and for constructive changes to the work under the contract.

The Board's finding of "relative straight forwardness" ignores the

complexities involved in the strict application of the cost principles inconsistent with the cost conversion of a fixed price contract into a cost reimbursable contract. The Board's dispute with the practical effect of a termination is not well taken because this approach discounts the validity of other factors found by courts and boards to justify such a characterization of contract conversion.

Significantly, a termination for convenience settlement should compensate Shaw fairly for the work done and the preparation made for the terminated portions of the contract, including costs resulting from a suspension of the work. *M.E. Brown*, 91-1 BCA ¯23,293. Further, the qualifying factors of whether the Government contributed to the increased costs and whether it is possible or not to separate the Government's portion of the

loss from the possible losses caused by the contractor requires that there be no disallowance of profit on a loss contract. *Scope Electronics, Inc.*, 77-1 BCA ¯12,404, Motion for reconsideration denied 77-2 BCA ¯12,586. *R.H.J. Corp.*, 69-1 BCA ¯7587. In effect, the question of whether the completed contract would have resulted in a profit or loss is immaterial. Finally, there is an inherent trade-off employed in a termination setting that disregards any evaluation of work produced as an appropriate standard for determining costs under a termination settlement. Reasonable costs of producing items which failed to meet requirements are recoverable under the Termination for Convenience Clause. *Caskel Forge, Inc.*, 1962 BCA ¯3318, *New York Shipbuilding Co.*, a Division of Merritt Champman & Scott Corp., 73-1 BCA ¯9852. This principle

recognizes that the parties do not need to engage in a fault-finding as to why the continued performance of the contract work is no longer in the Government's best interests.

Thus, juxtaposed against the Board's three qualifying cost principles found to be inconsistent with the conversion of a fixed price contract into a cost reimbursable contract are three competing considerations:

(1) Government suspension of work, actual or constructive, establishes a basis for cost recovery and makes the profit or loss position of the contract immaterial.

(2) Government contribution to increased costs of work, which is not possible to separate from any possible losses caused by a contractor, requires no disallowance of profit on a loss contract.

(3) Evaluation of the contractor's work

product is an inappropriate standard for determining costs under a termination settlement.

Petitioner maintains that the Board below erred, as a matter of law, in ignoring these countervailing cost principles which should have been considered and applied in examination of the convenience termination cost settlement.

Though Petitioner did not couch its Termination Settlement Proposal in terms of a suspension of work theory, the facts in the record clearly establish that there was a constructive suspension of work due to Job Change #2, which was never definitized by Respondent. The Respondent never prepared its independent estimate of the cost effect of Job Change #2 upon the contract cost. In a fixed price contract case where work never even commenced, the

ASBCA found the contractor entitled to recovery of costs for the eight-month delay between the discovery of asbestos and the convenience termination because the delay was so lengthy it was unreasonable to require the contractor to assume the risk of associated costs. Although the contractor never incurred costs during performance, the question of whether the contract would have resulted in a profit or loss was immaterial. *M.E. Brown, supra*.

The Respondent has conceded that Petitioner's interpretation of the specifications would probably be reasonable; however, Respondent insisted that its interpretation be enforced by the Inspector. The Board found that the specifications were "very exacting, yet not precise" and that the perpendicularity requirement did not use the "clearest language imaginable. Under those

circumstances, the Board ignored the Respondent's contribution to Petitioner's cost of the work and improperly found Petitioner to be in a loss position.

Finally, the Board has found Petitioner's pre-termination performance to be unsatisfactory by finding that approximately only 160 ft. was completed per specification requirements. Notwithstanding the fact that the specification requirements were unclear or open for more than one interpretation, the Board's evaluation of Petitioner's work product was improper because that standard has been rejected as inapplicable. The Board finds this unsatisfactory performance to be a yardstick for its finding that no constructive changes occurred. Yet, any conclusion regarding the value of the work product are immaterial, given the circumstances of a convenience termination.

Petitioner was attempting to meet a performance specification impossible to perform, given the language in the specifications. Such work effort, even in a loss position, has been found to be a reasonable basis for recovery of costs. *Scope Electronics, supra.*

ARGUMENT II:
Contract Clause SP.33 is applicable to a termination for convenience pricing action.

The Eng BCA finds that there is a preference for actual costs over estimated costs in a termination settlement. This preference runs parallel to the favored form for a termination proposal being on the inventory versus the total cost approach. Usually, a termination contracting office, ("TCO"), will direct a contractor to prepare his Settlement Proposal on an Inventory Basis. Only in

those cases where the contractor's books and records do not contain a sufficient actual level of cost detail to arrive at an Inventory Proposal should the TCO direct that the settlement proposal be submitted on a total cost basis. There are two points to be gleaned: (1) The TCO, not the contractor, determines the basis for the proposal; (2) sufficient actual cost detail must exist in order for an Inventory Proposal to be feasible. Directing submission of a total cost settlement proposal is inherently contradictory to a finding that actual costs can be identified with a sufficient level of specificity for computing ownership and operating costs for a contractor's equipment.

Because a TCO is charged with the guiding principle of fair compensation, he must consider whether fair compensation demands deviation from the general rule of

favoring actual costs if they are ascertainable. The TCO should be aware that the Contract itself at SP-33 required use of the Region I Manual unless the actual costs of each piece of equipment could be ascertained form the records. This was the contract clause upon which Petitioner's risk assessment was based at time of award. The Board finds that Shaw did not rely upon the word "each" in SP-33 at time of bid: however, no contractor at time of bid contemplates a termination for convenience either. See Appendix Blue for a overview of Sp-33. The Board attributes an unsavory motive to a contractor to avoid application of SP-33 by asserting at p. 64 of its Decision that a contractor could "unilaterally defeat the CO's right to use actual, ascertainable costs" simply by choosing not to separate some equipment costs in its accounts." A contractor could

hardly predict a termination in sufficient time to jockey its books so as not to separate equipment costs in its accounts. The more likely reason, relates to the lack of usefulness to a contractor to do so.

Respondent's TCO directed Shaw to prepare its proposal on a total cost basis. Why? The Board suggests that the TCO did so because there was at least one outstanding undefinitized change, Job Change #2, and the TCO wanted to be fair, which was commendable. The TCO had another option of course, if he truly believed Job Change #2 reduced the amount of work Petitioner would be required to perform, he could and should have issued a deductive change. The TCO elected to pass on performing an estimate to complete a reduced scope of work. The TCO did not pay attention to either the applicable total contract price or what would have been a

reasonable estimate to complete the contract as compared to a reasonable estimate for a deductive change order? If undefinitized changes are not expected to have an extreme impact on contract costs, it is appropriate to definitize the changes, adjust the contract price and apply the loss formula if necessary. By failing to act on Shaw's change proposals, prior to directing the submission of a termination cost proposal, the TCO skewed the basis for determining both the contract price ceiling as well as the potential of any loss. Just as the Respondent's survey for the baseline on the breakwater was inaccurate, the Respondent's delay in evaluation of Petitioner's pricing for constructive changes also created lack of a proper reflection of a cost baseline. Besides this, there is a more fundamental flaw in the Board's ruling.

The Board disputes that SP-33 applies to a termination. The TCO thought that it did since a termination is a negotiated procurement. The Board gives no rationale for its contrary impression and ignores that the Preface to the Region I Manual provides for its use in all construction contracts and all negotiated procurements.

The Board understands the Petitioner's semantic argument but is not persuaded that actual costs were not to be used. Petitioner's argument centers on compliance with the terms of the contract which called for application of the Region I Manual rates unless actual ownership or operating costs for each piece of equipment were ascertainable from the contractor's books. The Board believes that such actual costs were available in the Petitioner's records. In holding that actual costs on a collective basis represent adequate

compensation in a termination setting, the Board has ignored that equipment costs present an extremely unique cost area of a contractor's operations. A contractor's investment in its equipment represents an asset capable of generating revenue.

The Board has failed to recognize and apply the holding in *Tom Shaw, Inc.*, 90-1 BCA ¶22,580, wherein the DOT Board found that a contractor was entitled to compensation for its fully depreciated idle equipment, despite the Defense Contract Audit Agency's policy disallowing any reimbursement for fully depreciated inactive equipment.

In this Decision, the Board has adopted a theoretical approach which ignores the realities under which contractors operate. The DOT BCA points out that depreciation is an accounting device that spreads acquisition costs over the estimated life of an item for

recognizing the cost of equipment as a cost of doing business. The amount of depreciation that may be claimed each year is unrelated to the amount of use or annual revenue generated by the equipment. Under the DCAA approach, a contractor would not be entitled to consider the amortization of the purchase price of equipment if its useful life for accounting purposes had expires, even if the equipment had never been used. The Board found that, although fully depreciated and inactive, the contractor's equipment was capable of performing and generating revenue and thus was still valuable. Ownership of the equipment entailed costs such as maintenance, insurance, and taxes, in addition to the cost of money initially invested. The Board fund that **what especially cost money** during the period of enforced idleness was the contractors'

inability to perform other work with the equipment.

The DOT BCA refused to follow a strict accounting analysis which the Board below has chosen to follow. The DOT BCA stated that adopting the DCAA approach would mean that a contractor would not be entitled to consideration of the amortization of the purchase price if its useful life for accounting purposes has expired, even if that equipment had never been used and therefore provided no recoupment of its purchase price. This is exactly what the Eng BCA has imposed upon Petitioner by virtue of its decision. The inequity placed upon Petitioner is obvious.

As is well stated by the DOT BCA, a contractor does not (normally) purchase equipment merely to generate an annual tax deduction or an accounting write-off. A contractor purchases equipment in the

expectation that within a reasonable time, he will be able to recoup the acquisition cost and realize a profit, a return for the investment. Here, the decision below states that Shaw has been compensated for the equipment costs in that the acquisition costs were reimbursed. This fails to give consideration to Petitioner's purpose underlying the acquisition of equipment.

The Board's decision fails to recognize that it was the Government which chose to terminate the contract for convenience thereby depriving the Petitioner of the opportunity to earn income from its equipment. As is noted above, the contractor can not only reasonably anticipate recouping the value, but also anticipate generating revenue by the use of the equipment. The Eng BCA has deprived the Petitioner of this by adopting the position that the contractor is only

entitled to recoupment of the actual cost of the equipment while failing to address the problem that it was the Government which placed the Petitioner in the position as a result of this protracted termination for convenience. The Eng BCA does not find that Petitioner presented its loss of equipment use on a claim in the nature of additional profit, *Wolfe Construction Co.*, 88-3 BCA ¯22,122; therefore, there should be no need to address this issue on Petition.

The Board dismisses a method for calculating the operating costs for marine equipment, which was developed by the author of the Region I Manual, Mr. Glen Moosman, because the method had no support in the contract and because the Board believes that payment of acquisition cost in the amount of $162,104.00 plus a mark-up for Cost of Facilities Capital (CFC) and

operating costs was sufficient compensation.

The Board contrasts this to its own calculation of depreciation and CFC factors from the Region I Manual. The Board concedes that the Region I Manual does not provide rates for marine equipment but does provide a method to determine ownership costs but not operating costs for marine equipment. Moosman provided a suggested method using comparable operating costs for pieces of heavy land construction equipment similar in size and weight to the marine equipment. Moosman also confirmed that he had been present during some of the negotiation sessions when Petitioner was told to use the Region I Manual. The Board found such use of the Region I Manual was for interim rates only, pending the Audit results of whether actual costs could be determined. That may have been so, but

there is evidence to support the use of the Region I Manual. SP-33 had been accepted by both parties for estimating equipment costs throughout contract performance. Job Change #2 was priced under the Region I Manual. Cost proposals for changed work were submitted under SP-33 using the Region I Manual. The termination proposal was priced according to SP-33 requirements.

The Region I Manual represents average rates based on historical data gathered from a cross-section of the Corps' experience with many contractors. It represents a fair basis upon which to estimate equipment costs - both ownership and operating costs. The underlying reason for development of the Region I Manual was to address the insufficient state of the majority of the contractor's records as being insufficient to identify actual costs for each piece of equipment so that

Government Auditors could obtain complete data on equipment costs.

Because Petitioner's equipment costs are based on average rates as provided for in the Region I Manual, the Board's comments about the unreliable nature of the estimates are not well taken. The only possible factor to evaluate would be the amount of time for which equipment costs are projected. As Shaw has already noted, its inability to put its equipment back to work after the two terminations related to its lack of bonding capacity and its lack of capital resources, both of which arose from the lengthy period of time Respondent took to address the effects of the two terminations. Petitioner did not assume the risk of such delayed relief which came in dribbles over time. Awarding actual costs only for equipment rendered idle by acts of the Government does not bespeak

fairness. *Codex Corporation v. United States*, 226 Ct.Cl. 693 (1981).

CONCLUSION

In this Petition, this Court is faced with three novel interpretations issued by the Engineering Board of Contract Appeals ("Eng BCA", or "Board"). Petitioner maintains that these three interpretations represent such a bizarre twist from the existing case law concerning terminations for convenience that this Court should reverse and remand for proceedings consistent with the principles enunciated by this Court in *Maxima Corp. v. United States*, 847 F.2d1549 (Fed. Cir. 1988) [holding that changed circumstances must exist as a basis for the Government to avoid liability for breaching its contract by declaring a convenience termination],

Lisbon Contractors, Inc. v. United States, 828 F.2d 759 (Fed. Cir. 1987) [holding that the Government bears the burden of proof to establish the amount of a set off for corrective work in a convenience termination setting], and ***Blount Brothers Corp.*** *v. United States,* 872 F.2d 1003 (Fed. Cir. 1989)]holding that the "Substantial Evidence" rule does not require that automatic deference by given to the determination of an administrative Board where there is specific evidence in the record supporting a contrary conclusion].

By its construction of the termination for convenience clause, the Eng BCA has challenged the long-standing holding and well-accepted principle that a termination for convenience converts a fixed price contract into a cost reimbursable contract.

The Eng BCA finds that such a statement constitutes an "over simplification", because there are three countervailing limitations inherent in the termination for convenience clause which support the Board's holding that it would be inconsistent to treat a fixed price contract as being unqualifiably converted to a cost reimbursable contract.

The Eng BCA identified these three limiting factors as follows:

(1) The contract price serves as a ceiling on cost recovery;

(2) A profit allowance is partially or totally eliminated on a loss contract;

(3) Actual costs may be reduced by a loss factor.

These factors have always existed as the courts and boards have examined termination for convenience actions. There has been no emphasis placed on these

limiting factors prior to the instant decision. From the standpoint of the facts actually involved, the Eng BCA may have a point. From the standpoint of the facts actually involved, the Board's notions do not square with the pertinent circumstances. First, the Board's analysis ignores that it was the Contracting Officer's (hereinafter "CO') decision to pay the Petitioner funds in excess of the Contract ceiling price. Second, the Board's holding failed to give any weight to the CO's decision to apply a 10% profit factor on direct costs due Petitioner. Third, the existence of a loss contract was beyond Petitioner's control - thereby making application of any loss factor improper and immaterial. The CO found no reason to apply a loss factor, despite the conduct of approximately 20 negotiation

sessions and extensive audits of Petitioner's termination proposal.

What the Eng BCA's Decision has accomplished is tantamount to a judicial reversal of the CO's decision to terminate for convenience instead of default. The de novo review power of a Board does not enable it to disregard a CO's decisions favorable to a contractor. *Melvin Wilner v. United States*, Slip Opinion No. 92-5161, decided May 24, 1993, Fed. Circuit.

Petitioner contends that the Eng BCA committed a material error of law by failing to consider at least four competing factors consistent with the principle that a convenience termination converts a fixed price contract into a cost reimbursable contract:

(1) The convenience termination makes it impossible for a contractor to correct any allegedly defective work;

(2) Evaluation of a contractor's work is not an appropriate standard for determining costs under a termination settlement, including actuals, costs, profit, and whether a loss factor should be applied;

(3) Government contribution to increased costs of work, which are incapable of separation from any possible losses, caused by the contractor, require no disallowance of profit on a loss contract;

(4) Defective specifications and Government suspensions of work, actual or constructive, make the profit or loss position of the contract immaterial.

Petitioner has demonstrated that the Respondent should not benefit from chaotic circumstances under which the Petitioner was directed to submit its termination pricing. The Eng BCA applied abstract principles in total disregard of the

factual actions taken by the Respondent's CO.

The Eng BCA did not give due weight to the evidence justifying why the initial termination was for convenience and not default. Instead, the Eng BCA has circumvented the effect of a convenience termination by finding a loss contract without giving consideration to the Government's contemporaneous documents substantiating that the specifications was reasonable, and that the Government's position for rejecting the contractor's work was doubtful.

Finally, the Eng BCA has misapplied the burden of proof. It is well-accepted that the Government bears the burden of proof on the issue of the correctness of its actions in terminating a contractor for default. Likewise, in a convenience termination situation, it is the

Government's burden of proof to establish a loss contract and the amount of the loss. The Board clearly concedes that the Government did not meet its burden to prove the amount of loss but the Board totally disregarded that the Government never prepared an estimate to complete the contract. In the case of *Lisbon Contractors v. United States, supra*, the Government,

in a default termination action, did not perform an estimate of time to complete, which invalidated the default termination. It is undisputed that the Government, in this case, never prepared an estimate to complete the work. Therefore, the Board's sole basis on which to find a loss contract emanates from either Petitioner's completion estimate or the fact that only 20% of the work had been completed prior to termination. The Respondent submitted no evidence regarding cost estimates for

completion and yet the CO paid costs in excess of the ceiling price. Petitioner is being asked to both prove its costs and to prove why it was reasonable for the CO to pay funds in excess of the Contract's ceiling price. This is inconsistent with the burden of proof, where the Petitioner's proof is used to penalize it by the finding of a loss contract.

Shaw believes this Petition for a Writ of Certiorari serves as an opportunity for this Court to reconcile the content of the termination clause with the intent of the governing regulations so that a contractor terminated for convenience may not be put through the costly and time-consuming task of justifying the validity of both its own costs and the propriety of the Government's actions. This constitutes an unfair and onerous burden to bear under the practically unfettered right of the

Government to declare a termination of the contract for its convenience.

Respectfully submitted,

/S/

Thomas R. Hungerford
3857 S. Straits Hwy.
P.O. Box 849
Indian River, MI 49749
(616)238-4333